Filed 12/27/18 SLPR, LLC v. Christian Wheeler Engineering CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SLPR, LLC, Plaintiff and Appellant, v. CHRISTIAN WHEELER ENGINEERING et al., Defendants and Respondents.	D072736 (Super. Ct. No. 37-2011-00087485-CU-PN-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed.

Law Office of Scott W. Sonne and Scott W. Sonne; Beus Gilbert and Franklyn David Jeans, for Plaintiff and Appellant.

Manning & Kass, Ellrod, Ramirez, Trester, John D. Marino and Steven J. Renick, for Defendants and Respondents.

The trial court dismissed this action for failure to comply with Code of Civil Procedure section 583.310,[1] which requires that an action "be brought to trial within five years after the action is commenced against the defendant" (at times, section 583.310 deadline).

On appeal, plaintiff SLPR, LLC (Plaintiff) contends that the court erred "as a matter of law" on the following five grounds: (1) The court failed to consider the conduct of defendants Christian Wheeler Engineering (CWE), Charles H. Christian, and Michael B. Wheeler (together Defendants) which, according to Plaintiff, established either that Defendants waived application of section 583.310 or that Defendants were estopped to apply section 583.310; (2) the court failed to apply section 583.350, which provides for a six-month extension of section 583.310's five-year deadline under certain circumstances; (3) the court ruled that, had Plaintiff brought to the court's attention the section 583.310 deadline, the case could have gone to trial prior to the deadline; (4) the court failed to consider Plaintiff's diligence over the course of the six years from filing to the dismissal of the action; and (5) the dismissal on the present record is inconsistent with the statutory policies associated with dismissals for failing to timely bring a civil action to trial.

As we explain, Plaintiff has not established error "as a matter of law" (or otherwise), and the dismissal is not contrary to any statutory policy consideration. Accordingly, we will affirm the judgment of dismissal.

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1 Further undesignated statutory references are to the Code of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because the dismissal is based on Plaintiff's failure to have brought the action to trial within the statutory time period, the relevant facts all relate to the procedures employed after the filing of the action, not to the facts that underlie Plaintiff's complaint or Defendants' affirmative defenses.

Plaintiff and another entity filed the underlying action on March 11, 2011.[2] The complaint contains six causes of action against Defendants based on geotechnical engineering services that CWE provided for a construction project on oceanfront property in Coronado owned by Plaintiff. Plaintiff alleges that Christian, a geotechnical engineer, and Wheeler, a civil engineer, were the President/Chief Executive Officer and a principal engineer of CWE, respectively.

During the first five years of the litigation—i.e., prior to March 11, 2016—the court set at least eight different trial dates. In November 2015 and May 2016, the parties stipulated in writing to continue the trial—each time agreeing "to extend the time within which this matter must be brought to trial by 180 days pursuant to . . . § 583.330(a)."[3] With these additional 360 days, the section 583.310 deadline became March 6, 2017 (at

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2 Defendants did not seek to dismiss the complaint as to the other plaintiff, and the other plaintiff is not involved in this appeal.

3 Section 583.330, subdivision (a) allows the parties to stipulate in writing to "extend the time within which an action must be brought to trial" for purposes of the section 583.310 deadline.

times, March 2017 deadline).[4] As of and after the November 2015 stipulation, the trial court set an additional five trial dates after March 11, 2016. The last two of these trial dates—April 14, 2017, and May 5, 2017[5] (at times, April 2017 trial date and May 2017 trial date, respectively)—were after the March 2017 deadline. Indeed, the court set the April 2017 trial date *on September 27, 2016*—almost six months before the March 2017 deadline.

On May 4, 2017, the day before the May 2017 trial date, Defendants filed and served a motion to dismiss the complaint, as to Plaintiff only, pursuant to 583.360 (at times, section 583.360 motion).[6] Defendants argued that Plaintiff filed the complaint on March 11, 2011, that the section 583.310 deadline passed in March 2017, and that as of May 4, 2017, the action had not yet been "brought to trial" for purposes of section 583.310.

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4 The trial court so found; and Plaintiff and Defendants agree that, following the two stipulated extensions of the section 583.310 deadline, unless extended or tolled as argued by Plaintiff on appeal, the section 583.310 deadline was March 6, 2017.

5 Actually, Friday, May 5, 2017, was the trial call; the court's minutes from the trial readiness conference indicate that trial would commence the following Tuesday, May 9, 2017. During the trial court proceedings, the parties and the court agreed that, for purposes of the section 583.310 deadline, the trial would have started on May 5, 2017.

6 As applicable here, section 583.360, provides that, after notice to the parties, an action "shall be dismissed . . . if the action is not brought to trial within the time prescribed [by section 583.310]." (§ 583.360, subd. (a).)

Plaintiff filed an opposition, a supplemental opposition, and two declarations in support of its position that the court should deny Defendants' section 583.360 motion. Plaintiff presented a number of fact-based and law-based arguments.

Defendants filed a reply to Plaintiff's opposition and supplemental opposition.

At the hearing, the court orally granted Plaintiff's motion, emphasizing that, after the court set the April 2017 trial date *in September 2016*, Plaintiff did nothing to bring to the court's attention the March 2017 deadline:

> "[I]f at any time it had been brought to my attention there was any kind of a problem, this case could have been accommodated. Nobody brought that to my attention. *And it's the plaintiff's obligation to do that*. We are the third largest trial court in the nation. We have 150 judicial officers or something like that. There would [have] been plenty of opportunity to have this case tried in one of our departments. But more importantly, I can change my calendars around to accommodate. And had I known, had anybody told me that there was a five-year problem, this would have—this case would have been given the top priority and we would have gotten it to trial. Simple as that. [¶] . . . [¶] There was no Court-caused delay here. Had anybody told me that they needed to get this case to trial, it would have gone to trial." (Italics added.)

The court also filed a written minute order of dismissal with additional findings and conclusions that we will discuss, as necessary, in response to Plaintiff's arguments on appeal.

Plaintiff timely appealed from the order of dismissal. (See *Southern Pac. R. Co. v. Willett* (1932) 216 Cal. 387, 390 [For purposes of an appeal, "a minute order of the trial court dismissing an action [under the predecessor statute to section 583.360] is a final judgment."].)

II. DISCUSSION

An action must be brought to trial within five years after it is commenced. (§ 583.310.) If this deadline is not met, the action "shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties[.]" (§ 583.360, subd. (a).) The requirements of section 583.310 et seq. "are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." (§ 583.360, subd. (b).) In this latter regard, as applicable to the issues in this appeal, in computing the time within which an action must be brought to trial pursuant to section 583.310 et seq., courts must exclude the time during which "[b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile." (§ 583.340, subd. (c).) The parties, without court approval, may extend the statutory time within which to bring an action to trial, by entering into a written stipulation or an oral agreement in open court that is reflected in the minutes or a transcript of the proceedings. (§ 583.330.)

In construing these provisions, we are mindful of the statutory policies both that a "trial or other disposition of an action on the merits [is] generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action" and that "a plaintiff shall proceed with reasonable diligence in the prosecution of an action[.]" (§ 583.130.) Consistently, applicable tolling provisions "must be liberally construed consistent with the policy favoring trial on the merits." (*Dowling v. Farmers Ins. Exchange* (2012) 208 Cal.App.4th 685, 693.)

We independently construe the applicable statutes. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724 (*Bruns*) [effect of stay on five-year dismissal statute under § 583.340, subd. (b)].) However, we review for an abuse of discretion the trial court's decision to dismiss an action under section 583.360, subdivision (a)—including whether an exception to or extension of the section 583.130 deadline applies. (*Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1100 & fn. 8 (*Gaines*) [review of § 583.360, subd. (a) dismissal]; *Bruns,* at p. 731; *Sagi Plumbing v. Chartered Construction Corp.* (2004) 123 Cal.App.4th 443, 447 (*Sagi Plumbing*).) A trial court's incorrect application of a statute is an abuse of discretion. (*In re Lugo* (2008) 164 Cal.App.4th 1522, 1536, fn. 8 (*Lugo*).)

In reviewing a section 583.360 dismissal for an abuse of discretion, " '[t]he trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' " (*Gaines, supra*, 62 Cal.4th at p. 1100; see *Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1271 [an abuse of discretion in a § 583.360 dismissal occurs "only if there is no reasonable basis for the trial court's action, so that the trial court's decision exceeds the bounds of reason"].) In an appeal from a section 583.360 dismissal, the appellant bears the burden of affirmatively establishing an abuse of discretion. (*Bruns, supra*, 51 Cal.4th at p. 731; *Sagi Plumbing, supra*, 123 Cal.App.4th at p. 447.) All presumptions are in favor of the order of dismissal, and any issues regarding the sufficiency of the evidence to support the trial court's ruling must be

resolved in favor of the ruling. (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 465 (*Kelly*).)

A. *The Trial Court Did Not Err in Failing to Find a Waiver or an Estoppel*

In *Miller & Lux v. Superior Court* (1923) 192 Cal. 333, our Supreme Court ruled that where "words and conduct on the part of the defendants constitut[e] a waiver of their right to dismiss," such defendants may not later bring motion to dismiss for failure to bring an action to trial within the statutory time. (*Id.* at p. 339 [under former § 583].)

Similarly, in *Woley v. Turkus* (1958) 51 Cal.2d 402, the Supreme Court held that the doctrine of estoppel can be applied to preclude a defendant from obtaining a dismissal based on the plaintiff's failure to bring the action to trial by the statutory deadline. (*Id.* at pp. 408-409 [under former § 583; defendant's request to continue certain proceedings "carried with it the implied request that the entire proceedings be postponed" until the continued proceedings were concluded].) In this context, *Borglund v. Bombardier, Ltd.* (1981) 121 Cal.App.3d 276 (*Borglund*) described the appropriate standard to apply in determining whether the doctrine of estoppel may preclude a dismissal under the predecessor statute to section 583.360: Where a defendant's statements or conduct "lulls the plaintiff into a false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his deception."[7] (*Borglund, supra*, 121 Cal.App.3d at p. 281 [under former § 583].)[8]

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7 The appellate court remanded the matter to the trial court to consider in the first instance whether an application of the doctrine to the facts presented would estop the defendant from obtaining the requested dismissal. (*Borglund, supra*, 121 Cal.App.3d at p. 282.)

In addition to the common law applicable to the former statutory scheme, the current legislation expressly allows for the application of "the principles of waiver and estoppel" to a section 583.360 motion to dismiss like Defendants' motion here. (§ 583.140.)

Plaintiff argues that, based on Defendants' actions during the litigation, Defendants waived, or are estopped from asserting, a section 583.360 dismissal based on the March 2017 deadline. As we explain, Plaintiff did not meet its burden of establishing an abuse of discretion.

1. *The Parties' May 2016 Stipulation*

In November 2015, at a time when the section 583.130 deadline was September 7, 2016, the court set a trial date of June 10, 2016. In May 2016, the parties stipulated—and the court ordered—both to continue the trial date until July 8, 2016, and to extend the section 583.130 deadline for 180 days (to the March 2017 deadline). On appeal, Plaintiff argues that, because the written stipulation discloses that Defendants' trial attorney and certain of Defendants' witnesses would be unavailable if the trial commenced as scheduled in June 2016, and because the court continued the trial date from June 10 until

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8 In a related context—i.e., where the defendant moved to dismiss an action based on the plaintiff's failure to effect valid service by a statutory deadline similar to the statutory deadline by which a plaintiff must bring an action to trial—our Supreme Court described the doctrine of estoppel as follows: " '[A] person may not lull another into a false sense of security by conduct causing the latter to forebear to do something which he otherwise would have done and then take advantage of the inaction caused by his own conduct.' " (*Tresway Aero, Inc. v. Superior Court* (1971) 5 Cal.3d 431, 437-438 (*Tresway Aero*) [under former § 581a].)

July 8 by minute order dated May 27, 2017, based on the stipulation, "this 42-day delay should not have been charged to the [section 583.130 deadline]."[9]

With no explanation, Plaintiff cites "*Ward v. Levin* (1984) 161 Cal.App.3d 1026, 1035" (*Ward*) in support of its position regarding the unavailability of counsel or witnesses.[10] *Ward* does not help Plaintiff.

At the time *Ward* was decided, the five-year mandatory dismissal statute allowed parties to extend the dismissal deadline only by a stipulation *in writing*. (*Ward*, *supra*, 161 Cal.App.3d at p. 1034 [under former § 583, subd. (b); Stats. 1982, ch. 1402, § 3, p. 5355]; see *Tresway Aero*, *supra*, 5 Cal.3d at p. 439.) Thus, in the event the parties *orally* stipulated either to an extension of the dismissal deadline or to a continuation of the trial to a date after the dismissal deadline, the only way courts could preclude a defendant from enforcing the mandatory nature of the five-year dismissal statutory scheme was to apply the doctrine of estoppel; i.e., a defendant who obtained a plaintiff's oral agreement to extend time related to the mandatory dismissal deadline should be

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9 On May 27, 2017, the court ordered that the trial be continued 28 days—from June 10 until July 8, 2016. Plaintiff does not suggest why it is entitled to a daily credit from the date of the order (May 27) rather than from the date of the original trial (June 10).

10 Issues as to which an appellant provides no argument or discussion may be deemed forfeited. (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 108, fn. 9.) "Simply hinting at an argument and leaving it to the appellate court to develop it is not adequate." (*Cryoport Systems v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633.) While we must speculate as to Plaintiff's exact argument, we will exercise our discretion to consider the cited authority in the context of the record in the present appeal.

estopped from later seeing a dismissal based on the extended date. (See *Ward*, at p. 1034.)

In *Ward*, almost three months before the date of the applicable mandatory dismissal statute, the parties orally stipulated to continue the trial to a date approximately one month beyond the mandatory dismissal deadline. (*Ward, supra*, 161 Cal.App.3d at pp. 1033-1034.) As part of the oral stipulation, the defendants agreed that the four-month continuance of the trial date *would* " '*have no effect on the five-year statute, without prejudice to anyone.*' " (*Id.* at p. 1034, italics added.) Under these facts and a statute that did not allow for oral stipulations to extend the deadlines of the mandatory dismissal statutes, the "defendants' conduct in requesting continuance of the trial estopped defendants from seeking dismissal under the five-year provision of [former] section 583." (*Id.* at p. 1034.)

The present case is distinguishable. Here, as part of the same stipulation by which the parties agreed to continue the trial by 28 days (from June 10 until July 8, 2016), Defendants agreed to extend the section 583.130 deadline another 180 days (from Sept. 7 until Mar. 6, 2017); thus, here, as a matter of law, the filing of the written stipulation merely extended the section 583.130 deadline as agreed (§ 583.330, subd. (a)). Since the doctrine of estoppel was not triggered by the parties' May 2016 stipulation, Plaintiff's reliance on *Ward*'s application of an estoppel to deny an oral stipulation is misplaced.

2. *Defendants' September 2016 Ex Parte Application*

In September 2016—at a time when the trial date was October 14, 2016, and the section 583.130 deadline was March 6, 2017—Defendants filed an ex parte application to

continue the trial date approximately two and a half months "to a date in early January, 2017." The record does not contain any written or oral opposition to Defendants' application, although in Plaintiff's opposition to Defendants' section 583.360 motion to dismiss, Plaintiff's counsel testified that he "objected to a further continuance of the trial date at the 27 September 2016 *ex parte* hearing on the grounds that the action had been pending for a considerable length of time and that Plaintiff was eager to have its case come to trial for resolution." The court granted Defendants' ex parte application, and despite Defendants' requested date in early January 2017, the court continued the trial until April 14, 2017. *The April 2017 trial date was 39 days past the March 2017 deadline*.[11]

Plaintiff argues that, because Defendants requested the continuance of the trial date, Defendants are estopped from seeking a section 583.360 dismissal.[12] Even though

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[11] Plaintiff tells us that "[t]he court reset the trial date to a point beyond the five-year deadline *with full knowledge of the parties' filed stipulation* extending the deadline to March 6, 2017." (Italics added.) The record lacks any evidence or inference that the court *knew* of "the parties' filed stipulation." The stipulation did not require a court order; i.e., counsel filed it without court involvement. A more accurate statement is: When, on September 27, 2016, the court reset the trial to a date beyond the section 583.310 deadline, Plaintiff's counsel—*who personally signed a stipulation extending the section 583.310 deadline to March 6, 2017*—said nothing at the time or during the following five months before the March 2017 deadline.

[12] In the abstract, Plaintiff's argument makes no sense. Assume a plaintiff filed an action on July 1, 2013, resulting in a section 583.310 deadline of July 1, 2018; the court ordered the trial to begin on April 1, 2016 (leaving more than two years until the § 583.310 deadline); and the defendant moved to continue the trial three months until July 1, 2016 (still leaving two years until the § 583.310 deadline). According to Plaintiff's argument, the defendant in this hypothetical is forever estopped from asserting a section 583.360 dismissal.

the date of the requested continuance was well within the statutory deadline, according to Plaintiff, because Defendants "accepted" the April 2017 trial date ordered by the court, they became estopped from moving to dismiss the action after the section 583.310 deadline.[13] The authorities on which Plaintiff relies do not support an estoppel in this context.

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13 At oral argument on appeal, Plaintiff's counsel advanced a new theory based on Defendants' ex parte application to continue the date of the trial from October 14, 2016, until early January 2017. Instead of relying on an estoppel, counsel argued that, because the basis of Defendants' ex parte application was that certain defense counsel, defense witnesses, and potential jurors were unavailable during that time period, the statutory deadline for bringing the case to trial was "tolled" for at least 78 days on the basis of an impossibility to bring the case to trial during that time. We are aware that, in the calculation of the statutory deadline, section 583.340, subdivision (c) excludes any time during which bringing the action to trial "was impossible, impracticable, or futile." However, the question of a sufficient impossibility, impracticability, or futility "requires a fact-sensitive inquiry" that includes an exercise of the trial court's discretion in the first instance (*Bruns, supra*, 51 Cal.4th at p. 731; accord, *Gaines, supra*, 62 Cal.4th at p. 1100); and, under this standard, the trial court's discretionary ruling " 'is reversible only if arbitrary and capricious' " (*Gaines*, at p. 1100).

Even if we assume that Plaintiff timely raised this argument in the trial court, at oral argument on appeal counsel did not suggest, let alone establish, how the court's ruling was an abuse of discretion. Nor do we think it is, for at least two reasons. First, "ordinary delays, even ones beyond the plaintiff's control, are already accounted for in the [statutory] period" (*Gaines, supra*, 62 Cal.4th at p. 1102); and we are unaware of any authority that considers a requested continuance based on counsel's vacation or a witness's unavailability as anything other than an ordinary delay. Second, under section 583.340, subdivision (c), " ' "[t]he critical factor is whether the plaintiff exercised reasonable diligence in prosecuting its case" ' . . . " 'even during the last month of its statutory life" ' " (*Jordan v. Superstar Sandcars* (2010) 182 Cal.App.4th 1416, 1420 (*Jordan*)); and Plaintiff's failure to request a trial date at or after Defendants' ex parte hearing (Sept. 27, 2016) and the March 2017 deadline does not suggest, let alone establish, reasonable diligence in bringing the case to trial during the *five months* before the statutory deadline.

a. Rose v. Scott *(1991) 233 Cal.App.3d 537*

Plaintiff relies on the following quotation from *Rose v. Scott* (1991) 233 Cal.App.3d 537, 541 (*Rose*): " 'When a party seeks a continuance of trial, that party is estopped to assert limitation periods for bringing an action to trial.' "

In *Rose*, the trial court dismissed the action pursuant to section 583.360. (*Rose, supra*, 233 Cal.App.3d at p. 540.) The appellate court reversed, ruling that the doctrine of estoppel applied to toll two time periods based on the defendants' requests to continue proceedings in the trial court. (*Id.* at pp. 540-541.) The first resulted when the court granted the defendants' request to continue the trial setting conference, and the second occurred when the defendants requested a continuance of the trial date in order to have their motion for summary judgment heard. (*Ibid.*)

Initially, we disagree with the *Rose* court's application of the doctrine of estoppel. The opinion does not mention the standard of review or the trial court's exercise of discretion, instead applying estoppel as a matter of law without discussion, on the basis that, "when a party seeks a continuance of trial, that party is estopped to assert limitation periods for bringing an action to trial."[14] (*Rose, supra*, 233 Cal.App.3d at p. 541.)

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14 We note that, even under the standards mentioned in *Rose*, the initial continuance should not have resulted in the application of an estoppel, since it was a continuance of the trial setting conference, not the trial. (*Rose, supra*, 223 Cal.App.3d at p. 541.) Additionally, regardless of the appellate court's application of the doctrine of estoppel, as a matter of law, "the proceedings were properly stayed due to [a related pending] administrative action, and the time of the stay is excluded in computing the five-year limitation period. (§ 583.340, subd. (b).)" (*Rose*, at p. 541.)

In any event, that statement must be read in the context the two cited authorities on which the statement was based—*Ward, supra*, 161 Cal.App.3d 1026, 1034, and *Borglund, supra*, 121 Cal.App.3d 276. (*Rose, supra*, 233 Cal.App.3d at p. 541.) This is especially true, since the *Rose* opinion does not discuss the doctrine of estoppel or its application in the context of a section 583.360 dismissal *other than citing without discussion* Ward *and* Borglund.

We have already discussed *Ward* and explained why its application of the doctrine of estoppel is inapplicable here. In *Ward,* the defendants obtained a continuance of the trial date based on an oral stipulation that the continuance would not prejudice the plaintiff in bringing his case to trial within the statutory deadline; and without an estoppel, the plaintiff was unable to enforce the defendants' express agreement. (*Ward, supra,* 161 Cal.App.3d at p. 1034.) In contrast, here Defendants made no promises related either to the statutory deadline or to seeking a dismissal under section 583.360; rather, by twice stipulating in writing to extend the statutory deadline to dates certain, as a matter of law the deadline was extended a total of 360 days (see § 583.330, subd. (a)).

Similarly, in *Borglund*, in response to the defendants' motion to dismiss for failure to bring the action to trial within five years of its commencement, the plaintiff's attorney testified that the defendants' attorney "said that he would not seek a motion to dismiss if the case progressed beyond the five-year anniversary of the filing of the complaint." (*Borglund, supra*, 121 Cal.App.3d at p. 278.) However, because the trial court had erroneously concluded that it did not have the discretion to consider principles of estoppel, the appellate court reversed the dismissal and remanded with directions that the

trial court consider, and " 'render a discretionary decision' " in the first instance, whether the plaintiff established an estoppel. (*Id*. at p. 281.)

Contrary to the defendants in *Ward* and *Borglund*, Defendants here did not agree or stipulate to anything on which Plaintiff could have relied in arguably lulling Plaintiff into a false sense of security resulting in inaction.

b. Holder v. Sheet Metal Worker's Internat. Assn. *(1981) 121 Cal.App.3d 321*

In *Holder v. Sheet Metal Worker's Internat. Assn.* (1981) 121 Cal.App.3d 321 (*Holder*), the trial court dismissed the action under former section 583, subdivision (c), which required that a case be brought to trial within three years from the filing of the remittitur after a reversal on appeal. (*Holder*, at pp. 322-323 & fn. 1.) The appellate court reversed the dismissal, applying the doctrine of estoppel to bar the defendant from seeking a dismissal following *his* request to continue the trial to a date after the statutory deadline. (*Id.* at pp. 326-327.)

Citing *Holder*, Plaintiff argues: "Representations of readiness for trial at a future date bind the party making the representation consistent with candor to the court and the parties." More specifically, Plaintiff suggests that, because Defendants requested a continuance of the trial date and stated they would be ready for trial, the trial court erred "in allow[ing Defendants] to take advantage of [their] own requests for delay and representation of readiness by later moving to dismiss the case."

Holder provides no guidance, however, because there, *prior to the expiration of the statutory deadline*, the defendants moved to continue the trial to a date *beyond the*

statutory deadline. (*Holder, supra,* 121 Cal.App.3d at p. 324.) In contrast, here, in September when the statutory deadline to commence trial was in March 2017, Defendants moved to continue the trial "to a date in early January, 2017"—*two months prior to the statutory deadline*. The fact that *the court* selected a date in April 2017 (39 days past the March 2017 deadline) did not involve any action on Defendants' part that would trigger the application of the doctrine of estoppel. Defendants here merely requested that the trial be continued approximately two and a half months (from Oct. 14, 2016, until early Jan. 2017) and did not object when the court continued the trial six months (until Apr. 14, 2017).

In the language of our Supreme Court, these actions by Defendants did not involve—let alone *require* the application of—the doctrine of estoppel, because they did not " 'lull [Plaintiff] into a false sense of security by conduct causing the latter to forebear to do something which [it] otherwise would have done and then take advantage of the inaction caused by [Defendants'] own conduct.' " (*Tresway Aero, supra,* 5 Cal.3d at pp. 437-438.)

c. Breacher v. Breacher *(1983) 141 Cal.App.3d 89*

Citing *Breacher v. Breacher* (1983) 141 Cal.App.3d 89 (*Breacher*), Plaintiff argues: "A defendant need not specifically request a date they [*sic*] know to be beyond the five-year period in order to be estopped by their actions."

In *Breacher*, at a time prior to the expiration of the statutorily extended deadline in which to bring the case to trial, the trial court granted the defendants' request to continue the trial to a date beyond the deadline. (*Breacher, supra,* 141 Cal.App.3d at pp. 92-93

[under former § 583, subd. (b)].) At the time of the request, neither the parties nor the court was aware of the statutory deadline. (*Id.* at pp. 91 & 93, fn. 3.) The appellate court reversed the trial court's later dismissal of the action for failure to commence trial prior to this deadline. (*Id.* at pp. 91, 93.)

Just as in *Holder, supra*, 121 Cal.App.3d 321—i.e., where the defendants had affirmatively requested that the trial be continued to a date *after expiration of the statutory deadline* (*id.* at pp. 326-327)—the *Breacher* court concluded that the defendants should be estopped from seeking a dismissal based on the plaintiff's failure to have brought the action to trial within the statutory period. (*Breacher, supra*, 141 Cal.App.3d at p. 92; see *id.* at p. 93 [the case "is practically on all fours with *Holder*"].)

Thus, Plaintiff has correctly cited *Breacher* for the proposition that, in order for the application of the doctrine of estoppel, a defendant need *not* know that the date it requests for trial is beyond the statutory deadline. (See *Breacher, supra*, 141 Cal.App.4th at pp. 91, 93.) However, that authority is inapplicable in the present case, because Defendants here requested only that the trial be continued until early January 2017—*two months prior to the statutory deadline*.[15]

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15 What *is* applicable here is the following comment from the *Breacher* court: "It is of course plaintiff's duty, not defendants', to be aware of the pertinent date and to see that the case is brought to trial within [the statutory period]." (*Breacher, supra*, 141 Cal.App.3d at p. 93, fn. 3.) The trial court here set the April 2017 trial date *in September 2016*, giving Plaintiff almost six months in which to have requested a trial date prior to the March 2017 deadline.

d. *Conclusion*

By focusing on certain facts of the present case that were in *Rose, supra*, 233 Cal.App.3d 537, certain facts of the present case that were in *Holder, supra*, 121 Cal.App.3d 321, and certain facts of the present case that were in *Breacher, supra*, 141 Cal.App.3d 89—while ignoring other facts that distinguish the reasoning applied in those cases—Plaintiff fails to appreciate both that the application of the doctrine of estoppel is fact- and case-specific and that, for this reason, the trial court has *the discretion* to apply the doctrine to preclude a defendant from obtaining a section 583.360 dismissal in the appropriate case. (See *Gaines, supra*, 62 Cal.4th at p. 1100 & fn. 8; *Bruns, supra,* 51 Cal.4th at p. 731; *Sagi Plumbing, supra*, 123 Cal.App.4th at p. 447.)

Contrary to Plaintiff's presentation, neither *Rose, supra,* 233 Cal.App.3d 537; *Holder, supra,* 121 Cal.App.3d 321; nor *Breacher, supra,* 141 Cal.App.3d 89, supports Plaintiff's argument that, because Defendants "accepted" the April 2017 trial date in September 2016, they were estopped from obtaining a section 583.360 dismissal after the March 2017 deadline. Accordingly, Plaintiff has not met its burden of establishing that the trial court abused its discretion in declining to apply the doctrine of estoppel to preclude Defendants from seeking a section 583.360 dismissal on May 4, 2017.

3. *Defendants' Actions After the March 2017 Deadline*

As of September 2016, the trial date was April 14, 2017—three weeks after the March 2017 deadline. At the March 24, 2017 trial readiness conference—which was more than two weeks after the March 2017 deadline—the court's minute order reflects that the court continued the trial until May 5, 2017 "*pursuant to a party's motion*."

(Italics added.) Although the record on appeal does not contain a reporter's transcript of the trial readiness conference, based on Plaintiff's counsel's declaration in opposition to Defendants' section 583.360 motion, the trial court continued the trial date at *Plaintiff's* request.

Plaintiff argues that Defendants waived their right to seek a section 583.360 dismissal based on the March 2017 deadline, because *after the March 2017 deadline*, (1) Defendants stipulated to continue the trial from the April 2017 date to the May 2017 trial date, and (2) Defendants undertook discovery.

However, the record does not support either of these events. As we just explained, there is no indication that *Defendants stipulated* to continue the trial date; rather, *Plaintiff moved* to continue the trial date. Additionally, in its opening brief, Plaintiff tells us that, after the continuance, Defendants redeposed two of Plaintiff's witnesses. However, Defendants did not identify those witnesses in its appellate brief, and Defendants did not provide a record reference for its statement.[16] In our independent review of Plaintiff's opposition to Defendants' section 583.360 motion, we found no direct evidence that Defendants initiated any discovery after the court granted Plaintiff's motion to continue the trial to May 5, 2017.[17] Nonetheless, because Defendants do not deny having done

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16 In listing 10 other events that occurred after the trial readiness conference, Plaintiff supplied record references.

17 In a declaration from one of Plaintiff's attorneys in opposition to Defendants' section 583.360 motion, counsel identified three witnesses who were deposed after the April 2017 trial date but did not state who deposed them or what the topics of their testimony included.

so, we will assume, without Plaintiff having established, that Defendants conducted discovery between March 24 and May 4, 2017.

Plaintiff's first argument is that, if Defendants had not requested one of the depositions (that of Mr. Beus), Plaintiff would not have "agreed to continue the trial date," and "the case would have been tried as scheduled on April 14, 2017." There are at least three problems with this argument. First, as we explained *ante*, the record does not support Plaintiff's representation that Plaintiff "agreed" to continue the April 2017 trial date; rather, Plaintiff requested that the trial date be continued. Second, Plaintiff's statement that the case would have been tried on April 14 is speculative. Third, even the April 2017 trial date was past the March 2017 deadline.

Plaintiff next argues that Defendants' "active participation in the case following the [March 2017 deadline], indicated a clear intent to bring the case to trial on the agreed-to date," thereby "constitut[ing] a waiver of any right" to seek a section 583.130 dismissal. Plaintiff's authorities do not support an appellate ruling that Defendants' actions constituted a waiver *as a matter of law*.[18]

In *Butler v. Hathcoat* (1983) 146 Cal.App.3d 834, the defendant brought a motion to dismiss under a former statute that contained almost identical language as in section 583.130. (*Butler*, at p. 835 & fn. 2 [under former § 583, subd. (b)].) The trial court denied the motion, and the appellate court affirmed on the basis that the defendant had waived his right to pursue a dismissal—even though the case was not brought to trial

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18 Plaintiff does not suggest that the trial court abused its discretion in failing to find a waiver.

for more than eight years after filing. (*Butler*, at pp. 835, 840.) However, unlike the present case, in *Butler* the defendant did not bring the motion to dismiss until *19 days after the court issued its notice of intended decision following a court trial on the merits*.[19] (*Id.* at p. 837.) Here, Defendants brought their motion prior to the commencement of trial—i.e., prior to receipt of an intended adverse ruling. Thus, *Butler* does not compel a conclusion that the trial court here erred in declining to apply the doctrine of waiver to Defendants' action in bringing their section 583.360 motion.

Plaintiff's other authorities are equally unavailing. In *Westinghouse Electric Corp. v. Superior Court* (1983) 143 Cal.App.3d 95 and *Synanon Foundation, Inc. v. County of Marin* (1982) 133 Cal.App.3d 607, the trial court was presented with a set of facts; the trial court weighed the facts; the record contained sufficient evidence to support a finding that the defendant had waived the statutory deadline; and the appellate court affirmed the trial court's exercise of discretion. (*Westinghouse Electric Corp.*, at p. 102 [no abuse of discretion in denying motion]; *Synanon Foundation*, at p. 613 [trial court must exercise discretion rather than mechanically applying statute].) In *Bayle-Lacoste & Co. v. Superior Court* (1941) 46 Cal.App.2d 636, the appellate court denied a peremptory writ seeking a mandatory dismissal, ruling that because a voluntary appearance of a defendant is a waiver of service of the summons, a voluntary appearance of a defendant after the five-year deadline may also result in a waiver of the statute requiring a dismissal when an action is not brought to trial within five years of its commencement. (*Id.* at pp. 644, 647.)

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19 Plaintiff does not mention this outcome-determinative fact in its appellate briefing.

In each of these cases, therefore, the appellate court merely ruled that the trial court did not abuse its discretion in deciding whether to apply the doctrine of waiver to bar a dismissal based on the applicable statutory deadline in which to bring a case to trial. In contrast to these authorities, Plaintiff asks us to conclude that the trial court erred *as a matter of law* in not finding, after considering the evidence, that Defendants waived the section 583.130 deadline, thereby precluding their section 583.360 motion. We acknowledge both that a trial court's incorrect application of a statute is an abuse of discretion (*Lugo, supra*, 164 Cal.App.4th at p. 1536, fn. 8) and that the trial court's conclusions of law are review de novo (*Gaines, supra*, 62 Cal.4th at p. 1100 & fn. 8). However, the trial court's decision that Plaintiff did not establish a waiver involves neither an incorrect application of a statute nor a conclusion of law. Indeed, Plaintiff does not argue otherwise, instead suggesting that the trial court erred in not following cases from 35 years ago, in which other trial courts weighed other evidence and exercised their discretion by applying the doctrine of waiver. In so doing, Plaintiff's presentation on appeal does not establish error as a matter of law, and Plaintiff does not contend, let alone establish, that the trial court's failure to find a waiver was either arbitrary and capricious or exceeded the bounds of reason.

B. *The Trial Court Did Not Err in Failing to Apply the Six-Month Extension Provided in Section 583.350*

Section 583.350 provides: "If the time within which an action must be brought to trial pursuant to this article is *tolled or otherwise extended pursuant to statute* with the result that at the end of the period of tolling or extension less than six months remains

within which the action must be brought to trial, the action shall not be dismissed pursuant to this article if the action is brought to trial within six months after the end of the period of tolling or extension." (Italics added.)

Based on this statute, Plaintiff argues that, "because fewer than six months remained upon expiration of the [May 2016] written stipulation to extend the [section 583.130 deadline until] March 6, 2017, . . . the trial court erred as a matter of law in not providing [Plaintiff] with the additional six months in which to bring its case to trial." The problem with Plaintiff's analysis is that the March 2017 deadline did not result from a "toll[ing]" or "pursuant to statute" as required by section 583.350. The deadline was extended from September 7, 2016, until March 6, 2017, *as a result of a written stipulation*. Although a statute (§ 583.330, subd. (a)) allows the parties to extend the deadline by written stipulation, it is *the stipulation*, not the statute, that effects the extension of time within which the action must be brought to trial.

Moreover, Plaintiff's interpretation of section 583.350 leads to an absurd result, since it would *automatically* add an additional six months to *any* extension of the deadline effected by a section 583.330 stipulation, oral or written—even one as short as a week or a month.

The case authority on which Plaintiff relies, *Him v. Superior Court* (1986) 184 Cal.App.3d 35 (*Him*), is inapplicable, because in *Him* the extension of the deadline had been tolled *pursuant to a statute* that expressly deals with the computation of time for

purposes of a section 583.130 deadline—i.e., section 583.340, subdivision (c)[20]—not pursuant to a stipulation. (*Him*, at p. 38.)

Accordingly, section 583.350 does not apply, and we reject Plaintiff's suggestion otherwise.

C. *The Trial Court Did Not Err in Including in its Order a Statement Regarding the Court's Calendar and Practice of Setting Trial Dates*

In its order granting Defendants' section 583.360 motion, the court stated in part:

> "Plaintiff['s] dependence on a purported court scheduling conflict to toll the limitations period is unfounded. As a preliminary matter, there is no evidence that the pending five-year statute was ever raised by the parties when the October 14, 2016 trial date was set [*sic*[21]]. *Had the issue been presented to the court, the court could have easily accommodated an earlier trial date by either giving the instant case trial priority or by obtaining an available trial department on the wheel*. In addition, Plaintiffs' reliance on *Ward v. Levin* (1984) 161 Cal.App.3d 1026, 1035 is misplaced since the five-year statute was tolled in that case while the trial trailed waiting for an open courtroom. The Court of Appeal held that because the parties were ready and able to go to trial and were only prevented from proceeding due to court congestion, it was impossible and impracticable to bring the case to trial. *There is no evidence of a comparable scenario of court congestion here*. [¶] . . . [H]ad any party, particularly Plaintiff[], raised the looming 5-year deadline, *the trial date would have been adjusted appropriately and/or no continuance would have been granted*." (Italics added.)

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20 Section 583.340, subdivision (c) provides that, in computing the section 583.310 deadline, the time within which to bring an action to trial *excludes* any time during which it was "impossible, impractical, or futile" to do so. In *Him*, due to counsel's illness, "it was impracticable to get the case to trial" within the statutory period. (*Him, supra*, 184 Cal.App.3d at p. 37.) Thus, after section 583.340, subdivision (c) tolled the section 583.130 deadline during the time counsel was ill, section 583.350 extended that deadline another six months. (*Him*, at p. 38.)

21 We suspect the trial court meant either ". . . when the October 14, 2016 trial date was continued" or ". . . when the April 14, 2017 trial date was set."

From this language, Plaintiff complains that the court's order of dismissal "ignored its own unavailability for the July 8, 2016 trial date due to its congested trial calendar and the court's unavailability until April 2017 following [Defendants' September 2016] motion to continue." Based on this characterization of the court's "unavailability," Plaintiff then argues that earlier trial dates were "impossible, thus tolling the [mandatory dismissal] statute" as a matter of law.[22] (Bolding and initial capitalization omitted.) We disagree.

In June 2016—at a time when the trial date was July 8, 2016, and the section 583.130 deadline had been extended to March 6, 2017—Plaintiff gave written notice of an ex parte hearing to reschedule the trial date on the grounds that the court "ha[d] a conflict with the scheduled [July 8, 2016] trial date" and Plaintiff "ha[d] a conflict with the Court's proposed [new] dates." According to the court's minute order from the hearing, on the court's motion, the trial court was continued until October 14, 2016—almost four months prior to the extended section 583.130 deadline.

In September 2016—at a time when the trial date was October 14, 2016, and the section 583.310 deadline was still March 6, 2017—Defendants filed an ex parte application to continue the trial date "to a date in early January, 2017." The court granted Plaintiff's application and continued the trial until April 14, 2017, despite the requested date in early January. Although Plaintiff asserts on appeal that it opposed Defendants'

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[22] Quoting from *Ward, supra*, 161 Cal.App.3d at p. 1035, Plaintiff acknowledges that " '[t]he normal time of waiting for a place on the court's calendar is not excluded from computing the five-year period.' "

September 2016 ex parte application to continue the trial,[23] there is no suggestion that Plaintiff opposed the April 2017 trial date selected by the court—which was almost six weeks *after* the stipulated March 2017 deadline.

Given the foregoing factual chronology, Plaintiff has failed to establish that bringing the action to trial by the March 2017 deadline was, as Plaintiff suggests, "impossible." According to Plaintiff, "the court's calendar made it impossible to accommodate an earlier date." However, Plaintiff's statement regarding the court's calendar is speculative. Plaintiff cites no *evidence* to support its suggestion of impossibility, instead inferring from the trial dates selected by the court—without objection from Plaintiff—that there were no other dates available when the court selected October 14, 2016 (almost four months prior to the March 2017 deadline), and April 14, 2017 (almost 40 days after the March 2017 deadline).

To the contrary, as the court expressly ruled in its order granting Defendants' section 583.360 motion, quoted above: "Had the issue [of a section 583.130 deadline] been presented to the court, the court could have easily accommodated an earlier trial date by either giving the instant case trial priority or by obtaining an available trial department on the wheel. . . . [¶] . . . [H]ad any party, particularly Plaintiff[], raised the

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23 The record does not contain any written opposition or a reporter's transcript of the September 27, 2016 ex parte hearing.

looming 5-year deadline, the trial date would have been adjusted appropriately and/or no continuance would have been granted."[24]

Plaintiff argues that the record lacks substantial evidence of what it characterizes as the trial court's "findings" related to accommodating a timely request for a trial date prior to the March 2017 deadline. First, the court's statements are not factual findings; they are the court's response to Plaintiff's unsupported argument regarding the impossibility of bringing the case to trial. Moreover, Plaintiff's argument demonstrates a misunderstanding of *its* burden in opposition to Defendants' section 583.360 motion: "The plaintiff bears the burden of proving that the circumstances warrant application of the section 583.340[, subdivision](c) exception."[25] (*Bruns, supra*, 51 Cal.4th at p. 731.)

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[24] In addition, at the hearing on Defendants' section 583.360 motion, the court orally explained: "[I]f at any time it had been brought to my attention there was any kind of a problem, this case could have been accommodated. Nobody brought that to my attention. . . . And had I known, had anybody told me that there was a five-year problem, this would have—this case would have been given the top priority and we would have gotten it to trial. Simple as that. [¶] . . . [¶] . . . Had anybody told me that they needed to get this case to trial, it would have gone to trial."

[25] As part of this burden, Plaintiff was required to have demonstrated in the trial court that it exercised reasonable diligence at all stages of the proceedings: " 'The critical factor in applying these [section 583.340, subdivision (c)] exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case.' " (*Bruns, supra*, 51 Cal.4th at p. 730.) On appeal, Plaintiff emphasizes its reasonable diligence in prosecuting the case, contending that the trial court's failure to consider Plaintiff's diligence constitutes an error of law. We disagree.

First, there is no indication that the trial court failed to consider Plaintiff's efforts during the more than six years the case was pending. Moreover, " ' " ' "ordinary proceedings" ' " ' " in the trial court are not excluded from the computation of the section 583.130 deadline (*Bruns, supra*, 51 Cal.4th at p. 732; see *Gaines, supra*, 62 Cal.4th at p. 1102 ["ordinary delays, even ones beyond the plaintiff's control, are already accounted for in the five-year period"]); and Plaintiff does not suggest that the

Neither the court nor Defendants were required to submit evidence that courtrooms or judges were available; to have succeeded in establishing an impossibility to bring the case to trial by the March 2017 deadline, the burden in the trial court was *on Plaintiff to establish the unavailability of a courtroom or judge during all or any part of time it was ready to go to trial*.

In deciding Defendants' section 583.360 motion to dismiss, Plaintiff had the burden of proof in a fact-intensive analysis, and the trial court ruled against Plaintiff. No matter how many times Plaintiff tells us that the trial court erred as a matter of law, such a ruling does not raise an issue of law. Nor does Plaintiff argue that the trial court abused its discretion (see *Gaines, supra*, 62 Cal.4th at p. 1100 & fn. 8; *Bruns, supra*, 51 Cal.4th at p. 731), and all presumptions are in favor of the ruling made (*Kelly, supra*, 179 Cal.App.4th at p. 465). Accordingly, Plaintiff failed to establish reversible error based on the court's calendar.

D. *The Dismissal Is Not Contrary to the Statutory Policies to be Applied in Section 583.360 Proceedings*

In closing, Plaintiff emphasizes that the purpose of a dismissal for failure to bring a case to trial within a statutory time period is " 'to prevent *avoidable* delay for too long a period' "—i.e., not " 'arbitrarily to close the proceeding at all events in five years.' " (Quoting *Christin v. Superior Court* (1937) 9 Cal.2d 526, 532 [under former § 583].)

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prosecution of its case involved anything extraordinary. Finally, "[a] plaintiff's reasonable diligence alone does not preclude involuntary dismissal; it is simply one factor for assessing the existing exception[] of impossibility[.]" (*Bruns, supra*, 51 Cal.4th at p. 731.)

More specifically, Plaintiff argues that the court erred as a matter of law "when it failed to interpret Section 583 [*sic*] in a way that favored trial on the merits" as Plaintiff contends is required by section 583.130.[26]

Initially, we note that the trial court was not required to *interpret* any portion of section 583.310 et seq. In any event, we do not view the trial court's order as *applying* section 583.310 et seq. in a manner that disfavored a trial on the merits.

There is no question but that Plaintiff did not bring its action to trial within five years. Thus, under section 583.360, the dismissal was mandatory unless Plaintiff established a statutory "extension, excuse, or exception." In calculating the five years, the court expressly and properly extended the section 583.310 deadline for 360 days as a matter of law pursuant to the parties' written stipulations (§ 583.330, subd. (a)), and all of the other extensions were discretionary.

Moreover, the language of section 583.130 that sets forth the state's policy of favoring a trial on the merits *follows* other language of section 583.310—not mentioned by Plaintiff—which sets forth an initial "policy of the state that a plaintiff shall proceed

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[26] The Code of Civil Procedure does not contain a "Section 583," and we are unsure which statute Plaintiff intended to cite.

With regard to favoring a trial on the merits, section 583.130 provides in full: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter."

with reasonable diligence in the prosecution of an action." (See fn. 26, *ante*.) As the Court of Appeal said in a case on which Plaintiff relies, this reasonable diligence includes *the plaintiff's awareness* of the trial date and *the plaintiff's duty* to see that the case is brought to trial within the statutory deadline. (*Breacher, supra*, 141 Cal.App.3d at p. 93, fn. 3; see *Bruns, supra*, 51 Cal.4th at p. 731 [plaintiff's reasonable diligence required " 'at all stages of the proceedings' "]; *Jordan, supra*, 182 Cal.App.4th at p. 1420 [plaintiff's reasonable diligence required " ' "even during the last month" ' " before the statutory deadline].) Here, in September 2016, the trial court set the April 2017 trial date, and Plaintiff did nothing to request a trial date for the more than five months prior to the March 2017 deadline. A plaintiff's reasonable diligence in prosecuting its case does not absolve the plaintiff's obligation to prosecute its claims within the statutory guidelines.

Under these facts and the foregoing standards, the trial court did not err as a matter of law in applying the appropriate policies when it decided Defendants' section 583.360 motion.[27]

III. DISPOSITION

The June 16, 2017 order of dismissal is affirmed. Defendants are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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[27] Nor did Plaintiff argue, let alone establish, that the court abused its discretion in applying the appropriate policies when it decided Defendants' section 583.360 motion.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

GUERRERO, J.